Filed 6/28/10 P. v. Yates CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE EUGENE YATES, Defendant and Appellant.	H033798 (Santa Clara County Super. Ct. No. CC806073)

Defendant Jesse Eugene Yates was convicted after jury trial of criminal threats (Pen. Code, § 422),[1] and exhibiting a deadly weapon other than a firearm (§ 417, subd. (a)(1), a misdemeanor). The victim of the two offenses was defendant's sister Cil Taylor. The jury was unable to reach a verdict on similar counts regarding defendant's sister Peggy Kibbe, and the trial court dismissed those counts on motion of the prosecutor. The court found that defendant had two prior strikes (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)), and that he had served a prior state prison term (§ 667.5, subd. (b)). The court sentenced defendant to 25 years to life consecutive to six years.

[1] Further unspecified statutory references are to the Penal Code.

On appeal, defendant contends that (1) the court prejudicially erred in failing to instruct the jury with CALCRIM No. 358, (2) the admission of evidence that defendant claimed he was a bank robber and a "cop killer" was prejudicial error, (3) the admission of evidence of a statement made during a 911 call was prejudicial error, (4) the court prejudicially erred in failing to instruct the jury on the lesser included offense of attempted criminal threats, and (5) the evidence is insufficient to support the finding that he has two prior strikes. We agree that the evidence is insufficient to support the finding that defendant has two prior strikes, but find no other reversible error. Accordingly, we will reverse the judgment and remand the matter for resentencing unless the prosecutor elects to retry the allegation that defendant has two prior strikes.

Defendant has also filed a petition for writ of habeas corpus, contending that trial counsel rendered ineffective assistance. We have disposed of the petition by separate order filed this date. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

BACKGROUND

Defendant was charged by information with three counts of criminal threats (§ 422; counts 1, 2 & 5), and two counts of misdemeanor exhibiting a deadly weapon other than a firearm (§ 417, subd. (a)(1); counts 3 & 4). The alleged victim of counts 1 and 3 was Peggy Kibbe, the alleged victim of counts 2 and 4 was Cil Taylor, and the alleged victim of count 5 was Officer Eric Opp. The information further alleged that defendant had two prior federal convictions (robbery and kidnapping) that qualified as strikes (§§ 667, subds. (b)-(i), 1170.12), that the robbery conviction was also a serious felony (§ 667, subd. (a)), and that he had served a prison term (§ 667.5, subd. (b)). On August 8, 2008, the court granted defendant's section 995 motion to dismiss count 5. On August 12, 2008, the court denied the prosecutor's motion to amend the information to add a count alleging a violation of section 69 (resisting or deterring an officer). The court granted defendant's motion to bifurcate trial on the alleged priors.

The Prosecution's Case

In August 2007, defendant's sister Peggy Kibbe maintained an apartment in San Jose with her 19-year-old daughter Kristina.[2] Defendant was also living there, and their sister Cil Taylor and Cil's 14-year-old daughter D. were temporarily staying there.[3] Xochilt Lira-Valencia (Lira) lived downstairs from Peggy and she frequently heard disturbances coming from Peggy's apartment.

On August 18, 2007, sometime after 9:00 p.m., Lira heard screaming, yelling, and doors slamming in Peggy's apartment. After the disturbance stopped, Lira heard somebody going past her bedroom window, screaming. She looked out the window and saw Kristina and Cil running and screaming, " 'He's going to kill us.' " Although Lira did not see anybody else, she called 911. The call was placed at 10:42 p.m. Lira told a 911 operator that she thought that domestic violence was occurring in the apartment above her. She said that she could hear three females screaming, and that one was yelling for someone to call the police, but that she did not know whether any men or weapons were involved. Lira yelled out to Cil and Kristina, who were by then standing outside the front of Lira's apartment, that she was on the phone with 911. The police arrived within minutes. Lira later saw defendant outside her apartment urinating into the bushes and then handcuffed and in police custody.

Kristina called 911 at 10:43 p.m., and both she and D. talked to a 911 operator. Kristina said that her uncle was trying to stab her aunt with a knife. She said that they had locked him out. D. said that it was her mother that defendant had been trying to stab, that defendant had been drinking alcohol, and that "he has a tendency of . . . like a record

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[2] As some witnesses are family members and have the same last names, to avoid any confusion we will refer to them after their introduction by their first names.

[3] Cil did not testify at trial. Both Peggy and D. testified that they did not know where Cil was.

of being like this." Officers arrived while D. was still on the phone with the 911 operator.

Officers Eric Opp and Nicolas Barry responded with other officers to the apartment complex around 10:45 p.m. Officer Opp saw defendant urinating into the bushes. The officers grabbed defendant's arms, identified themselves, and handcuffed him. Defendant repeatedly threatened the officers, saying, " 'Let me go, I'm a bank robber. I kill people.' " " 'I'm going to kill you. I'm going to kill your family.' " Barry saw a kitchen knife in defendant's back pocket with its blade facing up. Opp removed the knife, put defendant in his patrol car, and put the knife in the trunk. An officer stayed at the car with defendant while Officers Opp and Barry went up to Peggy's apartment.

Peggy and Cil responded to the officers' knock. Peggy appeared agitated and her voice trembled. Cil also appeared agitated. She was pacing and breathing heavily. During a protective search of the apartment, Officer Barry located Kristina and D. in a bedroom. Cil was taken outside by another officer. Officer Opp talked to Peggy in the front room. He asked her what had happened. She was reluctant to talk and she said that everything was fine. When the officer said that this was a serious matter and that she needed to talk to him, Peggy sat in silence for about 20 to 30 seconds. She then said: " 'You know what, this isn't right and enough is enough,' " and she told him what had happened.

Peggy said that defendant had been drinking beer and she told him to quit doing so because she does not allow alcohol in her home. Cil argued with defendant about his drinking. Peggy let it pass, but when she saw defendant drinking from a large liquor bottle, she asked him to leave. Defendant said that Peggy was taking sides with Cil, and he began arguing with Peggy. Cil left the apartment and defendant ran after her. He came back into the apartment and ran back out holding a knife about shoulder level. Officer Opp retrieved the knife from his patrol car and Peggy identified it as one she keeps in a kitchen drawer. Peggy said that she ran after defendant, who was yelling

" 'I'm going to kill you. I'm going to kill you Cil.' " Peggy was able to get between defendant and Cil. Defendant then pointed the knife at Peggy and said " 'I'm going to get you too.' " He chased Peggy and Cil around the complex and back to Peggy's apartment. Peggy was in fear, and she and Cil locked themselves in her apartment.

Officer Barry talked to Kristina in a bedroom. Kristina was distraught and shaking. She said that everybody was inside when defendant started "getting out of control." The women fled the apartment. Defendant came out holding the knife and said, " 'Where is Cil?' " Cil ran. Defendant approached Kristina and said " 'I will get you too.' " She was afraid for her life so she ran. All the women managed to get back inside the apartment and to lock the door, leaving defendant outside.

Officer Barry then talked to D. in the bedroom. D. said that the women fled the apartment because defendant was out of control. Defendant came outside holding a knife and a cup of alcohol. He tossed the alcohol into her face and went after someone else. She ran. She managed to get Cil back into the apartment and they locked defendant out.

After Officer Opp went over Peggy's statement with her, he went outside and talked to Cil. Cil walked the officer around the apartment complex, showing him which way they had run. Officer Opp returned to the apartment and spoke to other officers before returning to his patrol car. Defendant was in the car, repeatedly yelling " 'Let me go. I'll break you down like a shotgun.' " Defendant repeated that he was a bank robber, that he did not care about the law, and that he "shoots cops." The officer drove defendant to the jail, during which time defendant continued his ranting. At the jail, a blood sample was taken from defendant. The parties stipulated that the blood sample was taken at 12:09 a.m., and that it revealed a blood alcohol level of .22.

A few days after defendant's arrest, Peggy approached Lira outside their apartments. Peggy said that she was sorry about the disturbance and that she was very happy Lira called the police. Peggy told Lira that she probably saved their lives.

The Defense Case

Peggy testified that she did not like Cil staying at her apartment because Cil constantly argued with everybody. On the evening of August 18, 2007, Peggy told Cil that she had to leave. Cil began yelling at everybody in the apartment. At some point that night, Cil, Peggy, and defendant took the argument outside and Kristina and D. went into their room. When Peggy and defendant came back inside, defendant put a kitchen knife in the waistband of his pants. Defendant then drank a large glass of hard liquor from a bottle Cil had brought to the apartment, even though Peggy told him that it would "make it worse." He and Peggy went back outside to talk. Peggy thought Cil had left, but then she heard Cil yelling inside the apartment. Shortly after she told defendant to wait outside and she went back inside the apartment, an officer knocked on her door. She never heard defendant threaten anybody, point the knife at anybody, or chase anybody around the apartment complex with the knife. Defendant had the knife because they had seen Cil's gang associates nearby during their argument outside with Cil. Peggy was not able to tell the officer this because the officer talked to her for only "a second" before he talked to Cil.

Kristina testified that she does not remember seeing defendant threatening anybody or chasing Cil around the apartment complex with a knife. She does not remember who called 911, and she was not sure if it was her voice and D.'s voice on the recording of the 911 call.

D. testified that she does not remember hearing any arguing going on, that she did not see or hear defendant threatening Cil or Peggy with a knife, and that, other than giving directions to the apartment, she does not remember what she told the 911 operator.

Halle Weingarten, a forensic toxicologist, testified that alcohol intoxication can affect one's ability to rationally anticipate and calculate the consequences of one's actions. It can also intensify one's mood, making it more unstable or irrational. The combination of a high blood alcohol level and an agitated mood might result in impulsive

verbalization. Thus, people under the influence of alcohol might say and do things that they do not necessarily intend to say or do.

Verdicts, Findings on the Priors, Post-Trial Motions, and Sentencing

On August 20, 2008, outside the presence of the jury, defendant waived his right to a jury trial on the alleged priors. On August 21, 2008, the jury found defendant guilty of counts 2 (criminal threats; § 422) and 4 (misdemeanor exhibiting a deadly weapon other than a firearm; § 417, subd. (a)) regarding Cil. The jury was unable to reach a verdict on counts 1 (§ 422) and 3 (§ 417, subd. (a)) regarding Peggy, and the court declared a mistrial as to those counts. On September 4, 2008, the court found that defendant had two federal convictions that qualified as prior strikes (§§ 667, subds. (b)-(i), 1170.12), that one of the convictions was also a serious felony (§ 667, subd. (a)), and that defendant had served a state prison term (§§ 666, 667.5, subd. (b)).

On November 14, 2008, defendant filed a request for the court to declare count 2 to be a misdemeanor pursuant to section 17 or, in the alternative, to dismiss the strikes pursuant to section 1385. On January 9, 2009, the court denied defendant's requests. It sentenced defendant to prison for 25 years to life consecutive to six years on count 2, with a concurrent term of six months on count 4, and it dismissed counts 1 and 3 on motion of the prosecutor.

DISCUSSION

CALCRIM No. 358

Defendant's counsel requested that the court instruct the jury with CALCRIM No. 358. "I believe that that instruction reads that evidence of a defendant's oral statements made out of court that were not recorded should be treated with caution."[4] Counsel

[4] CALCRIM No. 358 states: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the

argued that evidence was admitted that defendant made statements to Officer Opp while defendant was in the back of the police car, that the statements were not recorded, and that "those were prejudicial statements that the jury could make inferences from . . . ." The court denied the request, finding that the statements made by defendant were admitted with a limiting instruction, not for the truth of the matter. "[T]hey were just statements that were made and it's circumstantial evidence as to other . . . threats that were made that evening to the other . . . witnesses." "[T]hose statements were not in my opinion admission or confession made before or after the crime. And additionally the threats that were made to or attributed to your client as to Peggy Kibbe and Cil Taylor, those are—for [section] 422, that is an element of the crime and this instruction does not apply."

Defendant now contends that the court prejudicially erred in failing to give a cautionary instruction regarding his statements. He argues that the statements Peggy and Kristina attributed to him ("I'm going to get you too," and "I will get you too") were both threats and admissions as "[t]he use of the word 'too' would be an admission that he had already threatened someone else." He argues that a cautionary instruction such as CALCRIM No. 358 must be given "whenever there is evidence of an unrecorded statement of the defendant, including when the alleged statement was an element of the crime." He argues that the failure to give the cautionary instruction in this case was prejudicial because there was "an extensive dispute" as to whether defendant made the threatening statements.

Respondent contends that the trial court's decision "not to give the cautionary instruction on evidence of oral pretrial admissions was not prejudicial error."

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statement[s], along with other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

Respondent argues that "[t]he evidence of [defendant's] having made threatening statements to Peggy and Cil was direct evidence of the charged offenses." The evidence of defendant's threat to kill Kristina "did not sufficiently tend to incriminate [defendant] of the charged offenses to warrant the giving of a cautionary instruction." And, "the trial court admonished the jury that the testimony about [defendant's] threatening statements to the police was not admitted for the truth of their contents, but only for the purpose of determining whether [defendant] made the statements attributed to him and to show his demeanor."

"A trial court has a sua sponte duty to instruct the jury to view a defendant's oral admissions with caution if the evidence warrants it. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 393[, superseded by statute on a different point in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107 (*Carpenter*)] [purpose of cautionary instruction applies 'to any oral statement of the defendant, whether made before, during, or after the crime'].)" (*People v. Wilson* (2008) 43 Cal.4th 1, 19.) However, the cautionary instruction is not required when the statement is not an *admission* of the crime but *constitutes* the crime of criminal threats. (*People Zichko* (2004) 118 Cal.App.4th 1055, 1059.) In such a case, the cautionary instruction would be inconsistent with the reasonable doubt standard of proof; the instruction could mislead the jury "into believing that it could find [the defendant] guilty even if it did not conclude beyond a reasonable doubt that the statements were made, as long as the jury exercised 'caution' in making its determination." (*Id*. at p. 1060.) Therefore, the trial court did not err in refusing to give CALCRIM No. 358 regarding defendant's threats to Peggy and Cil, the alleged victims of the charged section 422 offenses.

Carpenter, cited by defendant, does not hold otherwise. In that case, the defendant was convicted of various crimes, including attempted rape and murder. (*Carpenter*, *supra*, 15 Cal.4th at p. 344.) During the course of one of the incidents, he accosted two hikers. One of the hikers heard defendant say to the other hiker, " ' "I want

to rape you." ' " (*Id*. at p. 345.) Our Supreme Court concluded that the cautionary instruction should have been given, finding that the defendant's "statement of intent to rape [the hiker] was part of the crime itself." (*Id*. at p. 392.) The court, however, did not consider the defendant's statement as one that itself *constituted* a crime. This is an important distinction. In finding Carpenter guilty of rape, the jury in that case did not necessarily have to find beyond a reasonable doubt that he had made the statement at issue. However, in order to find defendant guilty of criminal threats to Cil and/or Peggy in this case, the jury did necessarily have to find beyond a reasonable doubt that he had made the statements to them that are at issue. Therefore, the cautionary instruction was not required as to evidence of threats defendant made to Cil and Peggy.

When the evidence was introduced regarding defendant's threats to Officer Opp while defendant was sitting in the patrol car, the court instructed the jury that "the statements that are attributed to Mr. Yates at this point are not offered for the truth, just that he said those words. This is not to be considered by you as to the truth. [¶] Just that he was making these statements as he was sitting in the police patrol car and his state, his demeanor, et cetera. So you cannot use it as anything other than those are the words that he was saying; not for the truth." No limiting instruction was given regarding the use of the evidence of threats defendant made to Officer Opp before defendant was placed in the patrol car and to Kristina. However, assuming the statements at issue were admissions and the trial court had an obligation to give CALCRIM No. 358, we find no prejudice.

"To determine prejudice, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) Because the cautionary instruction's purpose is ' "to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or

whether the admissions were repeated accurately. [Citations.]" [Citation.]' (*People v. Dickey, supra*, 35 Cal.4th at p. 905.)" (*People v. Wilson, supra,* 43 Cal.4th at p. 19.) Moreover, when evaluating instructional error, we review the instructions as a whole. (*People v. Roybal* (1998) 19 Cal.4th 481, 526-527; *People v. Cain* (1995) 10 Cal.4th 1, 36.)

In this case, there was testimony that defendant did not make the statements to Kristina that were attributed to him, but there was no conflicting testimony regarding the statements defendant made to Officer Opp while he was in the patrol car. And, there was abundant evidence that defendant did make the threatening statements that constituted the violation of section 422 that he was convicted of. Peggy told Officer Opp that defendant yelled " 'I'm going to kill you Cil,' " while holding up a knife; Lira testified that she heard Cil yelling as she and Kristina passed by Lira's window that defendant was going to kill them; and both Kristina and D. told the 911 operator that defendant was trying to stab Cil with a knife. The jury was instructed on evaluating the believability of witnesses pursuant to CALCRIM No. 226, on the sufficiency of the testimony of one witness pursuant to CALCRIM No. 301, on evaluating conflicting evidence pursuant to CALCRIM No. 302, and on evaluating statements a witness made before trial pursuant to CALCRIM No. 318. On this record, we believe that defendant has not carried his burden of showing a reasonable probability that he would have obtained a more favorable verdict had CALCRIM No. 358 been given. (*Carpenter, supra,* 15 Cal.4th at p. 393.)

Defendant's Statements

After the court denied the prosecutor's motion to amend the information to add a count alleging a violation of section 69 (resisting or deterring an officer) based on the threats of violence that defendant had made to Officer Opp, and it granted defendant's request that evidence of his prior criminal history not be admitted pursuant to Evidence Code section 1101, although it would be admitted for impeachment should he testify, the court stated: "And I will get into another area that I don't know if counsel has thought

about, and this has to do to the threats that were made to Officer Opp. [¶] I intend on letting those in because they are evidence of [defendant's] continuing threats assuming that threats were made previously to other witnesses and the nature of the threats and his intent. I think it will be coming in that way also. So even though I didn't allow the PC69, I am going to allow his continued conduct at the scene. [¶] So I will hear further from counsel but . . . I don't see denying the motion to add that charge that somehow means that evidence is excluded."

Defense counsel stated: "That will be over defense objection for reasons previously stated. I believe these issues are collateral and I believe that Officer Opp would certainly be allowed to testify [defendant] was ranting and making generalized threats, but going into details of what he was saying, I think will be prejudicial. [¶] I want the record to be clear that is over defense objection." The court responded: "So noted and it will be a continuing objection."

Officer Opp testified that after defendant was handcuffed he repeatedly threatened the officer, saying in part, " 'Let me go, I'm a bank robber. I kill people.' " Officer Opp further testified that when he went back to his patrol car after speaking with Peggy and Cil, defendant repeatedly yelled that he was a bank robber, that he does not care about the law, and that he "shoots cops." At that point, the court gave the limiting instruction quoted above: "I'm going to admonish you that the statements attributed to Mr. Yates at this point are not offered for the truth, just that he said those words. This is not to be considered by you as to the truth. [¶] Just that he was making these statements as he was sitting in the police patrol car and his state, his demeanor, et cetera. So you cannot use it as anything other than those are the words that he was saying; not for the truth." Officer Barry also testified that he heard defendant ranting and making threatening statements while in the back of the patrol car. The court later instructed the jury pursuant to CALCRIM No. 303: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

Defendant now contends that the court abused its discretion pursuant to Evidence Code sections 1101 and 352 when it admitted the testimony that he said that he was a bank robber, that he kills people, and that he "shoots cops." "The specific references that [defendant] made to killing cops or robbing banks had very little effect on the issue for which they were admitted but were nonetheless of a kind uniquely to evoke an emotional bias against the defendant. Surely, for the purposes of showing intent and a common scheme, it would have been sufficient to tell the jury that [defendant] made repeated threats of violent to the officers and their families." "The prejudicial effect is heightened by the fact that [defendant] had apparently gone unpunished for the offenses about which he ranted. That is, the jury could reasonably assume that if [defendant] did indeed kill people, including police officers, yet was out of custody, then he had not been punished or had not been punished adequately for those offenses."

Respondent contends that "the trial court did not abuse its discretion or violate [defendant's] right to due process by admitting testimony that [defendant] stated he robbed banks, killed people, and shot and killed police." Respondent argues that defendant's statements were highly probative on the issues of defendant's specific intent and whether he actually caused Peggy and Cil, the alleged victims of his criminal threats (§ 422), to be in sustained fear for their or their families' safety. Respondent further argues that the evidence was also probative on the issue of whether defendant had brandished a weapon in a rude, angry, or threatening manner, which the jury had to find in order to convict defendant under section 417, subdivision (a)(1).

Evidence of a defendant's uncharged misconduct is admissible "when relevant to prove some fact (such as . . . intent . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) However, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid.

Code, § 352.) " ' "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" . . . " 'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.)

We agree with respondent that the challenged evidence was relevant to show defendant's intent and demeanor on the night of the offenses. Officer Barry testified that Kristina and D. had told him that night that they fled from defendant because he was "out of control." Officer Opp testified that Peggy told him that defendant threatened to kill her and Cil with a knife. Lira testified that she heard Cil and Kristina yell that defendant was going to kill them. Yet Peggy, Kristina and D. denied at trial that defendant made any threatening remarks or chased them with a knife. Evidence that defendant was ranting and making threatening statements to the police officers summoned to Peggy's apartment was probative on all the witnesses' credibility, and it helped the jury evaluate the conflicting evidence regarding defendant's statements and conduct prior to the officers' arrival. Although defendant's statements to the officers were distasteful or even repulsive, they were not more so than the statements Peggy and Kristina reported were

made to them. The court instructed the jury that defendant's statements were not to be considered for their truth, and instructed the jury that it was not to not let bias, sympathy, prejudice, or public opinion influence its decision. (CALCRIM No. 200.) No abuse of discretion or denial of due process has been shown.

D.'s Statement to the 911 operator

D. told the 911 operator that defendant had been trying to stab her mother, but her mother was now inside the apartment. The 911 operator asked D. if defendant still had the knife on him. D. responded, "I'm not sure. [¶] He's been drinking . . . like . . . he's been drinking alcohol." The operator asked, "Today?" D. responded, " yeah . . . and he has a tendency of . . . like a record of being like this." Defense counsel objected to admission into evidence of this portion, among others, of Kristina's and D.'s statements during the 911 call. "[I]n addition to the prejudicial effects of these statements, I believe some of them are simply inaccurate." The court overruled the objection to this portion of D's statements, stating, "It doesn't specifically refer to anything other than he's drinking alcohol."

Defendant now contends that "[t]he impression that was imparted by the statements that [he] was a bank robber and a cop killer were reinforced by the statement of D[.] in the 9-1-1 tape that 'he has a tendency of . . . a record of being like this.' " He argues that "the statement in the 9-1-1 tape, whether it refers to alcohol or to violence, has no probative value except as character evidence. . . . It was completely lacking in lawful, probative value but prejudicial in the extreme." He further argues that the lack of any limiting instruction as to the statement "heightened the prejudicial effect." "Because it was without probative value but highly prejudicial, the reference in the 9-1-1 tape to [defendant's] 'tendency' and 'record' should have been excluded both under Evidence Code section 352 and as a matter of due process."

Respondent contends that admission of D.'s statement was not prejudicial error. "Given that D[.] had testified that she did not hear any arguing on the day of the charged

offenses, given further that she equivocated about having called 911 and about whether the voice on the tape was Kristina's voice, and given also that D[.] claimed only to have given directions to the location where she was and could not recall anything else that she had said, the entire 911 tape was relevant as a prior inconsistent statement to prove that D[.] was not believable and to prove the truth of the contents of the 911 tape."

" 'Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]' [Citation.] A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.] ' "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)

While evidence of D.'s statement that defendant has "a tendency of . . . a record of being like this" may have been prejudicial in the broad sense of the word, it was also probative on the issue of D.'s credibility. The jury "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing." (Evid. Code, § 780.) D. denied at trial that she had heard defendant arguing or threatening anybody, and she testified that she did not remember what she told the 911 operator other than directions to the apartment. D.'s statement to the 911 operator was probative on the issue of whether she knew about defendant's statements and conduct at the time of the call. "Evidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment. [Citations.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1017.) As both prejudicial and probative on the issue of D.'s credibility, the evidence was admissible in the court's discretion. (Evid. Code, § 352; *People v. Lewis*, *supra*, 26 Cal.4th at pp. 374-

375.) Defendant was allowed to cross-examine D. regarding her statements in the recorded 911 call, and other witnesses supported D.'s trial testimony. Accordingly, we cannot say that that trial court abused its discretion in admitting D.'s statement during the 911 call.

Instruction on Lesser Offense

The parties discussed the proposed instructions with the court off the record, but they recited their objections for the record. During the on-the-record discussion, the court stated: "We have discussed and given some consideration to lesser included and at this point no lesser included?" Defendant's counsel responded, "No, your honor." Defendant now contends that the court had a sua sponte duty to instruct the jury on the lesser included offense of attempted criminal threats (§§ 664, 422). He argues that "[o]n the record in this case, a properly instructed jury could have found [him] guilty of an attempt and not guilty of the completed offense" based on a finding that his threats did not put Cil in sustained fear.

Respondent contends that no reversible error has been shown as the record would not support a finding that defendant was guilty of the lesser offense but not the greater.

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.) Generally, an attempt to commit a crime is a lesser included offense of that completed crime. (See § 1159; *People v. Anderson* (1979) 97 Cal.App.3d 419, 424.)

It is well settled that "a trial court must, sua sponte, or on its own initiative, instruct the jury on lesser included offenses 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' [Citation.]" (*People v.*

Barton (1995) 12 Cal.4th 186, 194-195, fn. omitted.) This means that "[a] criminal defendant is entitled to an instruction on a lesser included offense only if [citation] 'there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citations] but not the lesser. [Citations.]" (*People v. Memro* (1995) 11 Cal.4th 786, 871.) Any error in failing to instruct on a lesser included offense does not warrant reversal unless an examination of the entire cause, including the evidence, discloses that "it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

"Under the provisions of section 21a, a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*People v. Toledo* (2001) 26 Cal.4th 221, 230 (*Toledo*); *People v. Jackson* (2009) 178 Cal.App.4th 590, 596 (*Jackson*).) "[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Toledo*, *supra*, 26 Cal.4th at p. 231; *Jackson*, *supra*, 178 Cal.App.4th at p. 597.)

In this case, the jury properly found that defendant's threat to Cil was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 and reasonably caused Cil to be in sustained fear for her safety. (See *Toledo*, *supra*, 26 Cal.4th at p. 235; *Jackson*, *supra*, 178 Cal.App.4th at p. 597.) Officer Opp testified that Peggy told him that defendant ran out of the apartment yelling " 'I'm going to kill you Cil.' " Peggy also told the officer that she was in fear and that she and Cil subsequently

locked defendant out of her apartment. Lira testified that she saw Cil and Kristina running past her bedroom window screaming " 'He's going to kill us.' " Kristina called 911 and told the 911 operator that defendant was trying to stab Cil. Kristina told Officer Barry that defendant came after her and Cil with a knife and that she was in fear of her life. Cil was pacing and breathing heavily, and appeared agitated, when the officers arrived at Peggy's apartment after having found, handcuffed, and secured defendant. Although there was testimony that defendant never threatened Cil or anybody else that evening, there was no testimony that any threats defendant made did not actually cause Cil to be in sustained fear for her safety. On this record, we find that it is not reasonably probable that defendant would have obtained a more favorable result had the trial court instructed the jury on the lesser included offense of attempted criminal threats. Accordingly, any error by the trial court in failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats was harmless. (*People v. Breverman, supra,* 19 Cal.4th at p. 149.)

The Prior Strikes

At the hearing on defendant's alleged priors, the prosecutor submitted a copy of a May 14, 1973 federal district court judgment stating that defendant was convicted of "Armed Bank Robbery, in violation of Title 18, Section 2113(a)(d), United States Code, as charged in count one (1)" and "Kidnapping During Bank Robbery, in violation of Title 18, Section 2113(e), United States Code, as charged in count two (2)." The judgment further stated that the federal court sentenced defendant to 30 years on count 2 and a concurrent term of 25 years on count 1. The trial court in this case found that both of these convictions qualified as prior strikes (§§ 667, subds. (b)-(i), 1170.12).

Defendant concedes that he has one strike prior for bank robbery but contends that "the evidence is insufficient to show a separate, second 'strike' prior." "Proof of a violation of subdivision (e) of section 2113, . . . does not prove a prior conviction under section 1170.12 because the section does not require asportation of a kind that would be

sufficient to constitute kidnapping under California law and because that subdivision defines an enhancement, not a separate offense. Accordingly, the finding of a separate prior based on 'kidnapping during robbery' should be vacated and the case remanded for resentencing."

Respondent contends defendant's 1973 federal conviction for kidnapping during bank robbery constitutes a separate, second strike. Respondent argues that the law at the time of defendant's federal conviction "identified bank robbery and kidnapping during bank robbery within section 2113 as two separate federal offenses." Respondent further contends that, "when [defendant] was convicted of kidnapping under section 2113, subdivision (e), the statute and, thus [defendant's] conviction, required [him] to have moved his victim a distance which was not insubstantial and not merely incidental to his bank robbery violation."

At the time of defendant's 1973 convictions, 18 U.S.C. § 2113(a) stated in relevant part: " '(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, . . . [¶] Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.' " (*U. S. v. Faleafine* (9th Cir. 1974) 492 F.2d 18, 19 (*Faleafine*).) At the same time, subsection (d) of the statute stated: " '(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both." (*Faleafine*, *supra*, at pp. 19-20.) And, subsection (e) of the statute stated: " 'Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such

person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury so direct.' " (*Faleafine*, *supra*, at p. 20.)

In *Faleafine*, the defendant, like defendant here, was convicted on two counts. On count 1 the defendant was convicted of violating 18 U.S.C. § 2113(a) & (d), and in count 2 of violating 18 U.S.C. § 2113(e) "in the commission of the offense in Count One." (*Faleafine*, *supra*, 492 F.2d at p. 19.) The trial court sentenced the defendant to 25 years under count 1 and 50 years under count 2, with the sentences to be served consecutively. (*Id*. at p. 19.) The appellate court held that "[S]ubsection (d) which deals with conduct 'in committing . . . any offense defined in subsections (a) and (b)' and subsection (e) insofar as it deals with homicide or kidnapping occurring 'in committing any offense defined in this section,' each prescribes a more severe punishment for the substantive offense defined elsewhere in section 2113, but does not create a separate offense for which a separate sentence may be imposed." (*Id*. at p. 20.) "If the jury finds a violation of subsection (a), (d) and (e), [because a kidnapping occurred in the commission of the armed bank robbery], as it did here, there is but one offense, even though different persons may have been the victims of the subsection (d) conduct and the subsection (e) conduct . . ." (*id.* at p. 25), and the defendant "can only be sentenced under subsection (e)." (*Ibid*.) Therefore, the appellate court reversed both the sentence and the conviction on count 1, the conviction under subsections (a) and (d). (*Id*. at p. 25.)

However, the court left for "another time" the question whether homicide or kidnapping occurring "in avoiding or attempting to avoid apprehension for the commission" of the bank robbery or "in freeing himself or attempting to free himself from arrest or confinement for such offense" under subsection (e) "create separate offenses." (*Faleafine*, *supra*, 492 F.2d at p. 24.) In doing so, the court noted that other federal courts that had decided the issue were in conflict. (*Id*. at p. 25, and see cases cited therein.) The parties have not cited, and we have not found, any subsequent case stating that the law is now settled that subsection (e) can still constitute a separate offense so that

defendant's convictions under subsections (a) and (d) and (e) constitute two separate convictions.

As respondent acknowledges, "whether [defendant] suffered one or two federal convictions must be decided on the basis of the evidence presented below." As respondent also acknowledges, "[i]t is unclear" whether defendant's conviction in the federal case under 18 U.S.C. § 2113(e) is based on conduct that occurred "in committing" the armed bank robbery found in count 1, "in avoiding or attempting to avoid apprehension" for the offense, or "in freeing himself or attempting to free himself from arrest or confinement." Respondent contends that the record "clearly supports a finding that [defendant] suffered two convictions, one for robbery and the other for kidnapping," but acknowledges that "[i]f his kidnapping during a bank robbery was [for one of the latter two conducts described in subsection (e)], then federal law does not provide a clearcut answer to whether his sub[section] (e) conduct was a discrete crime separate and apart from his violation of sub[sections] (a) and (d)."

Neither the indictment in the case nor any other document setting forth the facts underlying the indictment is part of the record of defendant's federal convictions presented to the trial court. Thus, pursuant to *Faleafine*, defendant's separate conviction and punishment for violating 18 U.S.C. § 2113(a) and (d) when he was also found to have violated 18 U.S.C. § 2113(e) might have been improper. As it was the burden of the prosecution to prove beyond a reasonable doubt that defendant suffered two separate valid federal convictions constituting strikes (*People v. Tenner* (1993) 6 Cal.4th 559, 566), and it is unclear from the record that he did, we must find that there is insufficient evidence in the record to support the trial court's finding that defendant suffered two federal convictions constituting prior strikes. Accordingly, defendant's sentence as a third striker under the Three Strikes law must be vacated and the matter remanded for the resentencing of defendant as a second striker unless the prosecutor elects to retry the allegation that defendant's conviction under 18 U.S.C. § 2113(a) and (d) constitutes a

strike separate from his conviction under 18 U.S.C. § 2113(e).[5] (See *People v. Monge* (1997) 16 Cal.4th 826; *People v. Barragan* (2004) 32 Cal.4th 236.)

DISPOSITION

The judgment is reversed. The matter is remanded for the resentencing of defendant as second striker unless the prosecutor elects to retry the allegation that defendant has two separate prior strikes.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
DUFFY, J.

[5] As 18 U.S.C. § 2113(e) "prescribes a more severe punishment for the substantive offense defined elsewhere in section 2113" (*Faleafine*, *supra*, 492 F.2d at p. 20), defendant's conviction under § 2113(e) qualifies as a strike if "the substantive offense defined elsewhere in section 2113," that is, under § 2113(a), qualifies as a strike.